



DEPARTMENT OF VETERAN AFFAIRS

8320-01

38 CFR Part 74

RIN 2900-A063

VA Veteran-Owned Small Business (VOSB) Verification Guidelines

AGENCY: Department of Veteran Affairs.

ACTION: Proposed Rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its regulations governing the VA Veteran-Owned Small Business (VOSB) Verification Program. VA seeks to find an appropriate balance between preventing fraud in the Veterans First Contracting Program and providing a process that would make it easier for more VOSBs to become verified. The Verification Program has been the subject of reports from both the Government Accountability Office (GAO) and VA's Office of Inspector General stating that despite VA's Verification Program, fraud still exists in the Veterans First Contracting Program. Some stakeholder feedback has been that the current regulations at 38 CFR Part 74 are too open to interpretation and are unnecessarily more rigorous than similar certification programs run by the Small Business Administration (SBA). This proposed rule would clarify the eligibility requirements for businesses to obtain "verified" status, add and revise definitions, reorder requirements, redefine the definition of "control", and explain examination procedure and review processes. This proposed rule would additionally implement new changes - references to community property restrictions, "unconditional" ownership,

day-to-day requirements, and full-time requirements would be removed or revised and limited in scope; an exception for majority, supermajority, unanimous, or other voting provisions for extraordinary business decisions would be added.

DATES: Comments must be received by VA on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AO63 – VA Veteran-Owned Small Business (VOSB) Verification Guidelines”. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Tom Leney, Executive Director, Office of Small and Disadvantaged Utilization (00VE), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington DC 20420, (202) 461-4300. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: An Advanced Notice of Proposed Rulemaking was provided with a 60-day comment period which ended on July 12, 2013. We received comments from 39 commenters; the issues raised by these comments have been considered in drafting this proposed rule. We thank all commenters for their participation in this process. The bases for the proposed amendments are as follows.

Within § 74.1, VA proposes to create two new terms and amend or remove several definitions. New terms; “daily business operations” and “Permanent caregiver” would be added. The term “daily business operations” would replace “Day-to-day management” and “day-to-day operations” both of which would be removed; these definitions would be merged in order to simplify amendments made to § 74.4 while ensuring statutory requirements are still enforced/imposed. In addition, Permanent caregiver would be incorporated into § 74.1 whereas previously the concept and terminology was referenced in the regulation, most clearly at § 74.4(g)(1), but not defined. The term would be changed to permanent caregiver and references to personal caregiver would be removed. This amendment would create a definition which would account for definitions of similar and related terms found in 13 CFR 125.8(c), 13 CFR 125.8(d), 38 CFR 3.340(b), and 38 CFR 71.30. This change is intended to take multiple requirements, found throughout regulation, and synthesize them into a single cohesive definition. For purposes of this Part, a requirement that the applicant provide an explanatory statement which states the nexus between the veteran’s disability and the need for the permanent caregiver to manage the concern would be added to assist in program administration.

The following terms would be amended:

The term Center for Veterans Enterprise would be changed to revise Center for Verification and Evaluation (CVE) to reflect the name change effectuated at 78 FR 59861, September 30, 2013. The definition of CVE would be further amended to reflect the change to the functions of this office.

Joint venture would be amended to contain project and time restrictions utilized by other set-aside programs. VA has also added language to clearly address the current policy by indicating that at least one venturer must be a Veteran Owned Small Business (VOSB).

The definition of Office of Small and Disadvantaged Business Utilization would be amended to more accurately convey the role fulfilled by this office with respect to VOSB matters.

Participant would be amended to emphasize CVE's role in verifying status.

Primary industry classification would be amended to make a technical change to use the acronym NAICS as it had already been spelled out and properly noted in a parenthetical earlier in the definition.

Principal place of business would be amended to make a technical change, specifically the term "day-to-day operation" would be removed and replaced by "daily business operations" in accordance with the amended term from earlier in the definitions section.

Service-disabled veteran would be amended as the current definition has led to confusion regarding the documentation necessary to establish a service-connected

disability. This change would also help increase program efficiency by specifically referencing BIRLS, the system that allows CVE to quickly and accurately determine veteran status.

Service-disabled veteran-owned small business concern would be amended to remove reference to Reservists or members of the National Guard. This reference is appropriately addressed by the amended definition of Veteran. The word spouse would be removed in the first sentence and the word “the” would be added before “permanent caregiver”. This change would clarify for the public and potential participants the situations under which a permanent caregiver, previously referred to as a personal caregiver or spouse, would be able to maintain VOSB eligibility on behalf of a veteran. In the amended regulation, the requirements one must meet to serve as a permanent caregiver would be clearly defined. In order to avoid fraud, waste and abuse any spouse seeking to stand in for a veteran with permanent and severe disability would have to meet these same requirements. Therefore, the reference to spouse, separately from permanent caregiver, would be redundant and potentially confusing. Due to the use of the term “veteran” as opposed to “veteran or service-disabled veteran” throughout the amended regulation, a new last sentence would be added to clearly state that this change did not alter the requirements for an SDVOSB.

Small business concern would be amended to make a technical change removing the word “is” simply for clarity.

Surviving Spouse would be amended to make a technical change, specifically the Veterans Benefits Administration would be abbreviated as VBA.

The definition for unconditional ownership would be removed; the concept of ownership as required for this program would be addressed only in § 74.3(b) to avoid any conflict in the interpretation of the meaning.

Verification eligibility period would be amended to reflect the increased period for eligibility- which was changed from 12 months to 2 years; this amendment was established via 77 FR 38181, June 27, 2012. Additionally a technical change would amend the reference to Center for Veterans Enterprise by replacing it with the abbreviation CVE. A final technical change would replace the word “year” with “eligibility period” to agree with the change in the first sentence.

Veteran would be amended to add a reference to VBA. This revised definition is meant to be inclusive of all persons who served on active duty and were discharged or released under conditions other than dishonorable. Historically the program has had an issue wherein applicants who did in fact qualify as veterans under the statutory definition, did not meet the standards outlined in § 74.1. This change is not intended to create a new class of veteran, but rather to clarify that those who are eligible under the applicable statutes will be found eligible for participation in this program.

Veterans Affairs Acquisition Regulation is amended to remove Veterans Affairs and refer to VA as this is previously defined within the section.

Section 74.2 would be amended by revising paragraphs (a)-(e) and adding new paragraphs (f) and (g). In both 2010 and 2012, GAO published reports tasking VA with reducing potential instances of fraud, waste and abuse. VA has found in its administration of the verification program that the use of the procedures identified in

§ 74.2(e) best protects VA acquisition integrity and diminishes ongoing exposure to fraud, waste and abuse. Therefore, for such limited situations as identified in § 74.2, and only in these limited instances, VA finds that immediate removal from public listing is warranted in order to protect the integrity of VA procurement. Accordingly, the amendments to § 74.2 would serve to more comprehensively outline the circumstances under which a participant would be found ineligible for the VOSB Verification program

Section 74.2(a) would be amended to add the clause “submitted required supplemental documentation at <http://www.VetBiz.gov>,” to clearly explicate the key steps necessary for an application and verification. Additionally, a technical change would be made to use the abbreviated form “CVE” for consistency.

Section 74.2 (b) would be amended to support the current policy use of good character to address the potential impact of criminal activity on eligibility and thus to better protect the government from fraud, waste and abuse. The title would be amended to reference the System for Award Management (SAM), which has replaced the Excluded Parties List System. Additionally, the language of the first sentence would be amended to address the impact of 38 U.S.C. 8127(g)(3), which now provides VA authority to exclude all principals in the business concern. Accordingly, the language of § 74.2 would be amended to provide notice that the debarment of any individual holding an ownership and control interest in the concern will impact the concern’s eligibility.

Section 74.2(c) would be amended by adding the phrase “false statements or information” to reference the title and provide further clarification on the eligibility requirements. The removal provision would be additionally reworded to clarify the

current policy interpretation that removal is immediate. Finally a technical change would remove “the” before CVE in the last sentence.

Section 74.2(d) would be amended by including tax liens and unresolved debts owed to various governmental entities outside of the Federal government as financial obligations that would disqualify an applicant for inclusion in the Vetbiz VIP database. The title would be additionally amended to reflect this change.

Section 74.2(e) would be amended to clarify the consequences of SBA protest decisions and other negative findings. “Other negative findings” was additionally clarified by specifically referencing status protest decisions pursuant to 48 CFR 819.307. The title of this section would be accordingly amended to clarify this section is not limited to SBA decisions. In order to properly effectuate the provisions of the amended 48 CFR 819.307, § 74.2(e) would be amended to allow for immediate removal. The final sentence would be amended to take into account “other negative findings.”

Section 74.2(f) would be added to better effectuate the licensure requirement previously found in § 74.21(9). Through administration of the program, VA has determined that continued inclusion of concerns who fail to obtain and keep current required licenses creates a significant risk to the procurement process. Therefore, immediate removal from the VetBiz VIP database is warranted to protect the agency from fraud, waste and abuse.

Section 74.2(g) would be added to specifically reference SAM registration. SAM is a consolidated listing of previous databases and was not in existence at the time the

original regulation was created and therefore was not referenced. Registration through SAM is required by 48 CFR 4.1200 (supplemented by 48 CFR 804.1102).

Section 74.3(a) would be amended to simplify the title in order to avoid the potential for confusion. A technical change would remove the reference service-disabled Veteran. Reference to both veterans and service-disabled veterans in the regulation has proven to cause confusion for some applicants. By referencing only veterans, and making a change to the definition of service-disabled veteran owned small business, that confusion would be eliminated. The reference to employee stock ownership plans (ESOPs) would also be removed. Through years of program administration it has become clear that this exception does not fit within the verification program. ESOPs have changed in ways making evaluation very difficult. It is not clear how this exception benefits the veteran owner. Concerns having ESOPs could still be verified, so long as they meet all of the ownership requirements set forth in the regulation.

Section 74.3(b) would be amended to directly address the concerns of VA in balancing commercially reasonable business practices against procurement integrity. Section 74.3(b) as it is currently written is considered by many in the veteran community to be unduly burdensome. VA considered these concerns and addressed them by proposing to limit the scope of unconditional ownership, accepting commercially reasonable conditions and excluding only those that create a significant risk of fraud, waste and abuse. The new language would outline the concept of commercially reasonable business practices and how they will be evaluated by the program. The exception for conditions after death or incapacity would remain unchanged. Section 74.3(b)(1) would be added to explain the process by which CVE will evaluate the

commercial reasonability of conditions. This would be done on a case-by-case basis. Section 74.3(b)(2) would be added separately as the scenario addressed, regarding absence of fully vested interests, relates to a significant risk for fraud, waste and abuse, which would therefore be specifically exempted from the commercial reasonability analysis described in § 74.3(b)(1).

Section 74.3(c) would be amended by numerous technical changes. Specifically, subparagraphs (1), (2), and (3) would be removed from paragraph (b) and redesignated in new paragraph (c). Additional technical change to new paragraph (c) would remove references to “unconditional” as the requirements of this paragraph apply to all aspects of ownership. The reference to service-disabled veteran would be removed to conform with changes outlined in the explanation of § 74.3(a). Language would be added to paragraphs 74.3(c) (2) and (3) to align with a similar statement in paragraph (1) expressing how ownership must be demonstrated.

Section 74.3(c) would be redesignated as § 74.3(d) to account for new § 74.3(c) having been added. A technical change would remove the reference to service-disabled veteran to conform with changes outlined in the explanation of § 74.3(a).

Section 74.3(d) would be redesignated as § 74.3(e) to account for addition of new § 74.3(c). A technical change would remove the reference to service-disabled veteran to conform with changes outlined in the explanation of § 74.3(a). The clause relating to joint venture profit distribution would be removed from this section. This requirement would be now addressed in § 74.5. Section 74.4(d)(5) (redesignated § 74.4(e)(4))

would be amended to change “should” to “must” in order to create an enforceable requirement.

Section 74.3(e) would be redesignated as § 74.3(f) to account for addition of new § 74.3(c). A technical change would remove the reference to service-disabled veteran to conform with changes outlined in the explanation of § 74.3(a). Section 74.3(e)(1) would be amended by a technical change to replace “application” with “ VA Form 0877” in order to clarify the requirement and conform language to the rest of the regulation. Section 74.3(e)(1) would be changed to add a 30-day time period for submission of new application after a change in ownership. This change would provide the agency the ability to definitively and accurately track changes of ownership. By adding a time period for new application, the program would be better able to comply with its statutory mandate of verifying that all concerns listed in the VIP Database meet the ownership and control requirement of the regulation.

Section 74.3(e)(3) would be amended by a technical change to replace “application” with “VA Form 0877” in order to clarify the requirement and conform language to the rest of the regulation.

Section 74.3(e)(4) would be amended to add a reference to § 74.14 to demonstrate the potential impact of change of ownership on the eligibility period.

Section 74.3(f) would be removed in its entirety. In administering the program, this requirement was found to be unduly burdensome on veterans. CVE has also found that implementation of this provision does not significantly reduce the risk of fraud, waste and abuse in the program.

Section 74.4(a) would be amended to align with the changes made to definitions in § 74.1. The term “day-to-day management” would be removed as described above, and this would require the language of § 74.4(a) to be revised. The second sentence is moved from § 74.4(b) for organizational purposes and clarity.

Section 74.4(b) would be amended to align with the changes made to definitions in § 74.1. The term “day-to-day management” would be removed as described above, and this would require the language of § 74.4(b) to be revised. The last sentence would be amended to add a reference to § 74.4(j)(2) in order to properly identify the paragraph which establishes this requirement.

Section 74.4(c)(1) would be amended by technical change to remove “or service-disabled veterans” to eliminate confusion. Veteran classification issues are already addressed in § 74.1 as described above. The second and third sentences would be edited to clarify that the requirements apply only to Veteran owners, as opposed to non-Veteran owners of the concern. Section 74.4(c)(2) would be amended by technical change to redesignate as (c)(3). Section 74.4(c)(3) would be amended by technical change to be listed as (c)(2). The new organization would more logically group related concepts. Section 74.4(c)(4) would be amended by a technical change to be listed as § 74.4(d). This amendment would make it clear that this requirement applies to all aspects of control, not just those detailed in § 74.4(c). An additional technical change would amend the reference to paragraph (f) to paragraph (h) to correspond with redesignating of sections described below.

Section 74.4(e) would be amended and reorganized. VA would reorganize this provision, as well as following paragraphs of § 74.4 to clarify that there are certain control requirements that apply to all business entities, while others apply to specific business types (e.g. Corporation, LLC, Partnership). This new organization would clearly lay out the generally applicable standards in paragraph (e) and then move to the specific requirements for different business types in the following paragraphs. In the current version of the regulation, these general and specific requirements exist, but are not laid out in a logical and clear manner.

A new provision would be added in at § 74.4(e) in order to describe the general control requirements outlined in the explanation above. A reference to “extraordinary business decisions” would be added at § 74.4(e)(1) and (3) to clarify existing program policy. This exception would protect the minority owners of firms thereby encouraging investment and participation in veteran owned businesses. Section 74.4(d) would be redesignated as § 74.4(f) to account for addition of new § 74.4(d) and § 74.4(e). Language would be added to refer to § 74.4(e)(1) to assimilate the exception created therein. Section 74.4(e) would be redesignated as § 74.4(g) to account for addition of new § 74.4(d) and § 74.4(e). Language would be added to refer to § 74.4(e)(1) to assimilate the exception created therein. Section 74.4(f) would be redesignated as § 74.4(h) to account for the addition of new § 74.4(d) and § 74.4(e). Section 74.4(f) is would also be amended to account for the general requirements of 74.4(e) and to emphasize the specific criterion relating only to incorporations. Section 74.4(f) (new § 74.4(h) would also be amended to succinctly and clearly encapsulate the exception created in existing § 74.4(f)(1) (i), (ii), and (iii), and referenced in § 74.4(c)(4). The

language “at any time for any reason” would be added to focus the provision on commercially reasonable business structures. VA intends these changes to simplify requirements relating to control and delete redundancies. Section 74.4(g) and its associated subparagraphs would be redesignated as § 74.4(i). It would be further amended by technical change to remove the word “such” from the second sentence in order to clarify that these limitations apply to all non-Veterans. This change would help to guard against fraud. The term “personal caregiver” would be changed to “permanent caregiver” to be consistent with the definition added to § 74.1. Section 74.4(g)(3), redesignated as § 74.4(i)(3), would be amended to replace the word “salary” with “compensation” in order to be consistent. Additionally, in order to reflect current program policy, the word “dividends” would be replaced by the word “distributions” with regard to sources of compensation. This reference would be moved to directly follow the word “compensation” for clarity. Section 74.4(i) would be redesignated as § 74.4(j) with conforming and clarifying changes.

Section 74.5 would be revised to include joint ventures. The language would be reworded to clearly establish that 38 CFR Part 74 does not supersede 13 CFR Part 121 with respect to size determinations. A paragraph (b) would be added to specifically address eligibility of joint ventures. Subparagraph (b)(2) would be moved from its previous placement in 38 CFR 74.3(d)(2) for organization and to address all joint venture issues in one section. Additionally, the language would be edited in order to clarify that the VOSB entity, rather than the individual Veteran owner(s), must be entitled to the distribution. Subparagraphs (b)(1) and (b)(3) would be added to provide notice of the requirements outlined elsewhere in VA Regulation (819.7003).

Section 74.10 would be amended to remove reference to physical address for CVE. Addresses or methods for submission may change over time, and this change allows CVE to make reasonable and necessary adjustments without the need for amendment of the regulation.

Section 74.11 would be amended by a technical change to redesignate paragraphs (c)-(g) to account for addition of new paragraph (c). Additionally, “Center for Veterans Enterprise” would be changed to “CVE” in paragraph (a). Finally, “[t]he CVE” would be changed to “CVE” in paragraph (a).

Section 74.11(c) would be added to address the potential circumstances created if CVE does not receive all requested documentation. As a result of statutory changes, the program now must certify applicants prior to admission in the database. In order to comply with the statute, VA requests documentation to demonstrate eligibility. This paragraph would put the public on notice that failure to adequately respond to these document requests may render CVE unable to verify the eligibility of a concern and therefore may result in denial. The original § 74.11(c) would be redesignated as § 74.11(d) and would be amended by a technical change to insert a reference to the newly added paragraph (c). Additionally, the reference to paragraph (d) would be changed to paragraph (e) to account for redesignating. The term “totality of circumstances” would be added to clarify long standing CVE interpretation and procedure. References to § 74.11(b) and § 74.13(a) would be added to highlight all applicable exceptions. Finally, a last sentence would be added to clarify in the

regulatory text longstanding VA policy that the applicant bears the burden of establishing VOSB status.

Section 74.11(d) would be redesignated as § 74.11(e). The third sentence would be removed as it refers to withdrawal or removal of verified status. This issue is addressed in 38 CFR § 74.21, which specifically deals with how participants can exit the VetBiz VIP database. Therefore, the removal would help to eliminate redundancy and reduce the likelihood of confusion. Current § 74.11(e) would be redesignated as § 74.11(f), and § 74.11(f) would be redesignated as § 74.11(g).

The revised § 74.11(e) would consist of subparagraphs (1) and (2). Subparagraph (1) would continue to provide notice of the requirement for participants to provide notice to CVE of changed circumstances. Subparagraph (2) would specify that bankruptcy is a changed circumstance, and the section would include requirements to protect the agency through the bankruptcy process.

Current section 74.11(g) would be redesignated as § 74.11(h). A second sentence would be added to increase program efficiency by ensuring that applicants provide updated contact information. This would allow the program to use the most efficient methods to dispatch determinations and ensure that applicants will receive determinations in a timely manner.

Section 74.12 would be amended to expand the list of required documentation in order to provide notice of documentation that is routinely requested by CVE. This amended list would include documents previously referenced by § 74.20(b). While the documents would still be required for examination as described in § 74.20(b), they also

are initially required for the application. As the application is a concern's first exposure with the process, VA finds this list would be more appropriately placed in this section to put the public on notice of the documentary requirements. Additionally, "electronic form" would be changed to "VA Form 0877" throughout for clarity. Similarly, "attachments" would be changed to "supplemental documentation" throughout. Finally, the last two sentences would be combined and slightly reworded for clarity.

Section 74.13(a) would be amended to modify the start of the relevant 30-day time period. This change would provide the agency the ability to definitively and accurately track the request for reconsideration proceedings. Additionally, this change would provide the agency the ability to control the regulatory time period and consistently apply the subsequent provisions of the paragraph. The instructions for submission of a request for reconsideration would be changed to indicate that all instructions for proper submission will be found in the denial decision. Addresses or methods for submission may change over time, and this change would allow CVE to make reasonable and necessary adjustments without the need for amendment of the regulation. A sentence stating that the applicant may submit additional or amended documentation would be added to clarify existing program policy. Finally, the last sentence would be removed due to redundancy with the first sentence of paragraph (b).

Section 74.13(d) would be amended to change "or" to "and" in the first sentence to accurately reflect the actions taken by CVE in these situations. Additionally, information regarding how an applicant can request a formal size determination from the SBA would be removed as individual business concerns cannot request formal size determinations. In an instance where CVE denies for size issues, CVE would request a

formal size determination directly, and the company would be eligible to submit a request for reconsideration. A conforming amendment would be made to § 74.13(e). Section 74.13(g) would be amended to add a sentence to increase program efficiency by ensuring that applicants provide updated contact information. This would allow the program to use the most efficient methods to dispatch determinations and ensure that applicants will receive the determinations in a timely manner.

Section 74.14 would be amended to include notices of verified status cancellation in the list of determinations that trigger a waiting period before a concern may submit a new verification application. This appears to have been an omission in the prior version of the regulation. Additionally, the waiting period would be expanded from 6 months to 12 months. The program has instituted several procedures to assist applicants to identify and address easily correctable issues that render the applicant ineligible. The class of notices listed in § 74.14 are generally issued to applicants with substantial issues causing ineligibility. The 12-month waiting period would ensure that applicants will be motivated to avail themselves of the resources provided by CVE and allow sufficient time for ineligible concerns to address significant issues. Additionally, this would increase the efficiency of the program by reducing the number of applications submitted by concerns that do not conform to the verification guidelines.

The current text of § 74.14, as amended, would be designated as § 74.14(a) and new provisions would be added in § 74.14(b) providing for immediate removal of ineligible participants from the VetBiz VIP verification database.

VA only intends, to the extent practicable, to list as verified in the VetBiz VIP database concerns which currently meet verification requirements. This would serve the important purpose of assisting COs in the procurement process by ensuring the database only includes concerns that are eligible for award of set aside procurements.

Section 74.15(a) would be split into paragraphs (a), (b), and (c). A technical change would be made to what would be redesignated as § 74.15(a) to improve specificity. A change would be made to what would be redesignated as § 74.15(b) to require participants to inform CVE within 30 days of changes affecting eligibility, consistent with § 74.3(f)(1). A substantive change would be made to the list that would be redesignated as § 74.15(c), which would be expanded to include all situations in which the eligibility period may be shortened. Section 74.15(b) would be removed because it dealt with affiliation. Section 74.5 would state that the SBA will make determinations on affiliation. Therefore, any shortening of the eligibility period due to an affiliation determination would result from an SBA determination. This scenario would be addressed by § 74.2(e), and is referenced appropriately at what would be designated § 74.15(c). Finally, paragraphs (c), (d), and (e) would be redesignated as (d), (e) and (f) respectively.

Section 74.20(b) would be amended by minor technical changes in the first three sentences for simplicity and clarification. In the first sentence, the phrase, “or parts of the program examination” would be removed. In the second sentence, “location” would be changed to “location(s).” In the third sentence, the word “[e]xaminers” is changed to “CVE.” Section 74.12, “[w]hat must a concern submit to apply for VetBiz VIP Verification Program,” would fully address the required documentation necessary for

verification and therefore the complete list would be removed from § 74.20 in order to avoid redundancy and confusion.

Section 74.21 would be extensively reordered for clarity and to conform with changes made to other sections of the regulatory text. Section 74.21(a) would be amended by a technical change to remove reference to the “verified’ status button” in order to reflect the current graphical user interface of the VIP database. Additionally, “Vendor Information Pages” would be changed to “VIP.” Section 74.21(b) would include a technical edit, “Vendor Information Pages” changed to “VIP.” Section 74.21(c) would be added to reference the immediate removal provisions established by and clarified in § 74.2. Previous § 74.21(c) and associated subparagraphs would be redesignated as § 74.21(d) and associated subparagraphs. Additionally, reference to the “verified’ status button” would be removed to reflect the current graphical user interface of the database. Section 74.21(c)(5) would be removed as involuntary exclusions would now be addressed in § 74.2. Section 74.21(c)(6) would be redesignated as § 74.21(d)(5) to account for deletion of (c)(5). Additionally, the phrase “or its agents” would be added to clarify who may request documents. Section 74.21(c)(7) would be redesignated as § 74.21(d)(6) to account for deletion of (c)(5). Section 74.21(c)(8) would be removed as the action addressed by that provision would now be addressed in § 74.2. Section 74.21(c)(9) would be removed as the provision would now be included in § 74.2 as a grounds for immediate removal. Section 74.21(c)(10) would be redesignated as § 74.21(d)(7). The term “application” would be removed as VA Form 0877 reflects current program requirements. 60 days would be changed to 30 days to conform with revised § 74.3(f)(1) of this part. Section 74.21(e) would be added as notice to the public

that failure to report changed circumstances within 30 days is in and of itself good cause to initiate cancellation proceedings.

Section 74.22(a) would be amended to base the start of the relevant 30-day time period on the date on which CVE sent notice of proposed cancellation of verified status. This change would provide the agency the ability to definitively and accurately track the cancellation proceedings. Additionally, this change would provide the agency the ability to control the regulatory time period and consistently apply the subsequent provisions of the paragraph. section 74.22(e) would be amended by a technical change to replace “Office of Small and Disadvantaged Business Utilization” with “OSDBU.”

Section 74.25 would be amended by a technical change to replace “Department” with “VA.” Additionally, the provision would be revised to expand the pool of individuals required to provide personally identifiable information.

Section 74.26 would be amended by technical change to reflect the amended title of § 74.12.

Section 74.27 would be amended to reword the first sentence to specify that all documents submitted to the program, not only those used to complete applications, will be stored electronically. Additionally, “VetBiz Vendor Information Pages” would be changed to “CVE” in order to clearly denote who will be in possession of the documents and responsible for their retention. The location reference would be removed due to the electronic nature of the records to be maintained by the program. The second sentence would be revised to indicate that any owner information provided will be compared to

any available records. Finally, references to records management procedures to be followed and procedures governing data breaches would be added.

Section 74.28 would be amended to abbreviate references to VA and CVE.

Section 74.29 would be amended to refer to VA's records management procedures, which would govern, absent a timely written request from the Government Accountability Office.

Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with the rule finally adopted if possible or, if not possible, such guidance would be superseded.

Paperwork Reduction Act

This proposed rule contains no provision constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are

defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). This proposed rule would generally be small business neutral, as it would apply only to applying for verified status in the VetBiz.gov Vendor Information Pages (VIP) database. The proposed regulation would merely seek to clarify and streamline the existing rule and would add no additional burdens or restrictions on applicants or participants with regard to the VA VOSB Verification Program. The overall impact of the proposed rule would be of benefit to small businesses owned by veterans or service-disabled veterans. VA estimates the cost to an individual business to be less than \$100.00 for 70-75 percent of the businesses seeking verification, and the average cost to the entire population of veterans seeking to become verified is less than \$325.00 on average. On this basis, the Secretary certifies that the adoption of this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of §§ 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages, distributive impacts and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory

Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

This proposed rule would affect the verification guidelines of veteran-owned small businesses, for which there is no Catalog of Federal Domestic Assistance program number.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on October 20, 2015, for publication.

List of Subjects in 38 CFR Part 74

Administrative practice and procedure, Privacy, Reporting and recordkeeping requirements, Small businesses, Veterans.

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Dated: November 2, 2015

Michael P. Shores,
Chief Impact Analyst,
Office of Regulation Policy & Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 74 as follows:

PART 74 – VETERANS SMALL BUSINESS REGULATIONS

1. The authority citation for Part 74 continues to read as follows:

Authority: 38 U.S.C. 501 and 513, unless otherwise noted.

2. Revise § 74.1 to read as follows:

§ 74.1 What definitions are important for VetBiz Vendor Information Pages (VIP) Verification Program?

For the purpose of part 74, the following definitions apply.

Center for Verification and Evaluation (CVE) is an office within the U.S. Department of Veterans Affairs (VA) and is a subdivision of VA's Office of Small and Disadvantaged Business Utilization. CVE receives and reviews all applications for eligibility under this part and maintains the VIP database. CVE assists VA contracting offices to identify veteran-owned small businesses and communicates with the Small Business Administration (SBA) with regard to small business status.

Daily Business Operations are, at a minimum, the marketing, production, sales, and administrative functions of the firm, as well as, the supervision of the executive

team, the implementation of sound policies and the setting of the strategic direction of the firm.

Days are calendar days. In computing any period of time described in part 74, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where CVE is closed for all or part of the last day, the period extends to the next day on which the agency is open.

Eligible individual means a veteran, service-disabled veteran, or surviving spouse, as defined in this section.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-law.

Joint venture is an association of two or more small business concerns to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. A joint venture must be comprised of at least one veteran owned

small business. For VA contracts a joint venture must be in the form of a separate legal entity.

Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's chapter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders

Non-veteran means any individual who does not claim veteran status, or upon whose status an applicant or participant does not rely in qualifying for VetBiz Vendor Information Pages (VIP) Verification Program participation.

Office of Small and Disadvantaged Business Utilization (OSDBU) is the office within VA that establishes and monitors small business program goals at the prime and subcontract levels. OSDBU works with VA Acquisitions to ensure the creation and expansion of small businesses opportunities by promoting the use of set-aside contracting vehicles within VA procurement. OSDBU connects and enables veterans to gain access to these federal procurement opportunities. The Executive Director, OSDBU, is the VA liaison with the SBA. Information copies of correspondence sent to the SBA seeking a certificate of competency determination must be concurrently provided to the Director, OSDBU. Before appealing a certificate of competency, the Head of Contracting Activity must seek concurrence from the Director, OSDBU.

Participant means a veteran-owned small business concern which CVE has “verified” and deemed eligible to participate in VA's veteran-owned small business program.

Permanent caregiver is the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, as determined by VA's Veterans Benefits Administration (VBA), to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran with a permanent and severe disability. The applicant or participant must demonstrate that but for the permanent and severe disability the veteran would meet the requirements of this part. There may be no more than one permanent caregiver per service-disabled veteran with a permanent and severe disability. To be eligible for VetBiz VIP Verification, the applicant must provide the following:

- (1) Appointment of the Permanent Caregiver. A permanent caregiver must be formally appointed. This can be accomplished by: (i) order of a court of competent jurisdiction; (ii) designation of the VA, National Caregiver Support Program, as the Primary Family Caregiver of a veteran participating in the Program of Comprehensive Assistance for Family Caregivers (this designation is subject to the Veteran and the caregiver meeting other specific criteria as established by PL 111-163 and the Secretary and may be revoked if the eligibility

criteria do not continue to be met); or (iii) a legal designation which clearly states that the permanent caregiver will undertake responsibility for managing the well-being of the service-disabled veteran.

(2) Determination of Disability. A written determination from VBA that the veteran has a permanent and total service-connected disability as set forth in 38 CFR 3.340.

(3) Explanatory Statement. A written statement that must include: (i) the rationale for the appointment of the permanent caregiver; (ii) an explanation of how the appointment contributes to the veteran's well-being; (iii) an explanation of why the permanent caregiver is needed to manage the applicant concern (including how the permanent caregiver is actually representing the veteran's interests in controlling/running the concern); and (iv) the veteran's consent to the appointment of the permanent caregiver.

NOTE TO DEFINITION OF PERMANENT CAREGIVER: In the case of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody.

Primary industry classification means the six-digit North American Industry Classification System (NAICS) code designation which best describes the primary

business activity of the participant. The NAICS code designations are described in the NAICS Manual published by the U.S. Office of Management and Budget.

Principal place of business means the business location where the individuals who manage the concern's daily business operations spend most working hours and where top management's current business records are kept. If the office from which management is directed and where the current business records are kept are in different locations, CVE will determine the principal place of business for program purposes.

Same or similar line of business means business activities within the same three-digit “Major Group” of the NAICS Manual as the primary industry classification of the applicant or participant. The phrase “same business area” is synonymous with this definition.

Service-disabled veteran is a veteran who possesses a service-connected disability rating between 0 and 100 percent. For the purposes of VA’s veteran-owned small business program the service-connected disability can be established by either registration in the Beneficiary Identification and Records Locator Subsystem (BIRLS) maintained by the VBA, a disability rating letter issued by VA, or a disability determination from the Department of Defense.

Service-disabled veteran-owned small business concern (SDVOSB) is a business not less than 51 percent of which is owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; the management and daily business operations of which are controlled by one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, the permanent caregiver of such veteran. In addition, some businesses may be owned and operated by an eligible surviving spouse. Ownership and control by a veteran, as opposed to a service-disabled veteran, will not meet the SDVOSB requirements set forth in this Part.

Small business concern--CVE applies the small business concern definition established by 48 CFR 2.101.

Surviving spouse is any individual identified as such by VA's VBA and listed in its database of veterans and family members. To be eligible for VetBiz VIP Verification, the following conditions must apply:

(1) If the death of the veteran causes the small business concern to be less than 51 percent owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall, for the period described in paragraph (2) of this definition, be treated as if the surviving spouse were that veteran

for the purpose of maintaining the status of the small business concern as a service-disabled veteran-owned small business.

(2) The period referred to in paragraph (1) of this definition is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) The date that is 10 years after the date of the veteran's death; or

(iv) The date on which the business concern is no longer small under Federal small business size standards.

(3) The veteran must have had a 100 percent service-connected disability or died as a direct result of a service-connected disability.

NOTE TO DEFINITION OF SURVIVING SPOUSE: For program eligibility purposes, the surviving spouse has the same rights and entitlements of the service-disabled veteran who transferred ownership upon his or her death.

VA is the U.S. Department of Veterans Affairs

Vendor Information Pages (VIP) is a database of businesses eligible to participate in VA's Veteran-owned Small Business Program. The online database may be accessed at no charge via the Internet at <http://www.VetBiz.gov>.

Verification eligibility period is a 2-year period that begins on the date CVE issues its Notice of Verified Status Approval letter establishing "verified" status. The participant must submit a new application for each eligibility period to continue eligibility.

VetBiz.gov (VetBiz) is a Web portal VA maintains at <http://www.VetBiz.gov>. It hosts the Vendor Information Pages database.

Veteran has the meaning given the term in section 101(2) of Title 38, United States Code, as interpreted through Title 38 of the CFR. In addition, any person having a determination of veteran status from VBA, and who was discharged or released under conditions other than dishonorable will be deemed to be a veteran for the purposes of this program.

Veteran-owned small business concern (VOSB) is a small business concern that is not less than 51 percent owned by one or more veterans, or in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one

or more veterans; the management and business operations of which are controlled by one or more veterans and qualifies as “small” for Federal business size standard purposes. All service-disabled veteran-owned small business concerns (SDVOSBs) are also, by definition, veteran-owned small business concerns. When used in these guidelines, the term “VOSB” includes SDVOSBs.

Veterans Affairs Acquisition Regulation (VAAR) is the set of rules that specifically govern requirements exclusive to VA prime and subcontracting actions. The VAAR is chapter 8 of title 48, Code of Federal Regulations, and supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

3. Revise § 74.2 to read as follows:

§74.2 - What are the eligibility requirements a concern must meet for VetBiz Vendor Information Pages (VIP) Verification Program?

(a) *Ownership and control.* A small business concern must be owned and controlled by one or more eligible veterans, service-disabled veterans or surviving spouses, have completed the online VIP database forms, submitted required supplemental documentation at <http://www.VetBiz.gov>, and have been examined by VA's CVE. Such businesses appear in the VIP database as “verified”.

(b) *Good character and exclusions in System for Award Management (SAM).* Individuals having an ownership or control interest in VetBiz verified businesses must have good character. Debarred or suspended concerns or concerns owned or

controlled by debarred or suspended persons are ineligible for VetBiz VIP Verification. Concerns owned or controlled by a person(s) who is currently incarcerated, or on parole or probation (pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity) are ineligible for VetBiz VIP Verification. Concerns owned or controlled by a person(s) who is formally accused of a crime involving business integrity are ineligible for VetBiz VIP Verification. If, after verifying a participant's eligibility, the person(s) controlling the participant is found to lack good character, CVE will remove the participant from the VIP database immediately, notwithstanding the provisions found in § 74.22 of this part.

(c) *False statements.* If, during the processing of an application, CVE determines, by a preponderance of the evidence standard (in keeping with other administrative actions), that an applicant has knowingly submitted false information, regardless of whether correct information would cause CVE to deny the application, and regardless of whether correct information was given to CVE in accompanying documents, CVE will deny the application. If, after verifying the participant's eligibility, CVE discovers that false statements or information has been submitted by a firm, CVE will remove the participant from the VetBiz VIP database immediately, notwithstanding the provisions of § 74.22 of this part. Whenever CVE determines that the applicant submitted false information, the matter will be referred to the Office of Inspector General for review. In addition, CVE will request that debarment proceedings be initiated by the Department.

(d) *Financial obligations.* Neither a firm nor any of its eligible individuals that fails to pay significant financial obligations, including unresolved tax liens and defaults on Federal loans or State or other government assisted financing, owed to the Federal

government, the District of Columbia or any state, district, or territorial government of the United States, is eligible for VetBiz VIP Verification.

(e) *Protest Decisions or other negative findings.* Any firm verified in the VetBiz VIP database that is found to be ineligible by a SDVOSB/VOSB Status Protest decision will be immediately removed from the VetBiz VIP database, notwithstanding the provisions of § 74.22 of this part. Any firm verified in the VetBiz VIP database that is found to be ineligible due to a U.S. Small Business Administration (SBA) protest decision or other negative finding may be immediately removed from the VetBiz VIP database, notwithstanding the provisions of § 74.22 of this part. Until such time as CVE receives official notification that the firm has proven that it has successfully overcome the grounds for the determination, that the decision is overturned on appeal, or the firm applies for and receives verified status from CVE, the firm will not be eligible to participate in the 38 U.S.C. 8127 program.

(f) *Permits, licenses and state charters.* A concern must obtain and keep current any and all permits, licenses, and charters required to perform contracts sought by the concern. If CVE determines that an applicant fails to meet this requirement CVE will deny the application. If after verifying the participant's eligibility CVE discovers that the participant no longer satisfies this requirement, CVE will remove the participant from the VetBiz VIP database immediately, notwithstanding the provisions of § 74.22 of this part.

(g) *System for Award Management registration.* All applicants for VetBiz VIP Verification must be registered in SAM at <http://www.sam.gov>, or its successor prior to application submission.

4. Revise § 74.3 to read as follows::

§ 74.3 Who does the Center for Verification and Evaluation (CVE) consider to own a veteran-owned small business?

An applicant or participant must be at least 51 percent directly and unconditionally owned by one or more veterans.

(a) *Direct ownership.* Ownership by one or more veterans must be direct ownership. An applicant or participant owned principally by another business entity that is in turn owned by one or more veterans does not meet this requirement; however, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a veteran where the trust is revocable, and the veteran is the grantor, a trustee, and the sole current beneficiary of the trust.

(b) *Unconditional ownership.* Ownership must not be subject to prohibited conditions which cause or potentially cause ownership benefits to go to another (other than after death or incapacity).

(1) CVE will analyze conditions on ownership on a case-by-case basis. A condition(s) which is determined to align with commercially reasonable business practices will not be considered a prohibited condition. For purposes of determining commercial reasonability CVE will consider factors, including but not limited to, general use of similar conditions by concerns within the same or similar line of business and uniform applicability of the condition(s).

(2) Notwithstanding paragraph (b)(1) of this section, a veteran's ownership interest must be fully vested with immediate entitlement to all associated benefits.

(c) CVE will evaluate ownership according to the following criteria for specific types of small business concerns.

(1) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51 percent of each class of partnership interest must be owned by one or more veterans. The ownership must be reflected in the concern's partnership agreement.

(2) *Ownership of a limited liability company.* In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be owned by one or more veterans. The membership interests must be reflected in the concern's operating agreement.

(3) *Ownership of a corporation.* In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be owned by one or more veterans. The ownership interests must be reflected in the concern's stock certificates and stock ledger.

(d) *Stock options' effect on ownership.* In determining ownership, CVE will disregard any unexercised stock options or similar agreements held by veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans will be treated as exercised, except for any ownership interests that are held by investment companies licensed under Part 107 of title 13, Code of Federal Regulations.

(e) *Profits and distributions.* One or more veterans must be entitled to receive:

(1) At least 51 percent of the annual distribution of profits paid to the owners of a corporate, partnership, or LLC applicant or participant;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation, partnership, or LLC.

(4) An eligible individual's ability to share in the profits of the concern must be commensurate with the extent of his/her ownership interest in that concern.

(f) *Change of ownership.*

(1) A participant may remain eligible after a change in its ownership or business structure, so long as one or more veterans own and control it after the change. The participant must file an updated VA Form 0877 and supporting documentation identifying the new veteran owners or the new business interest within 30 days of the change.

(2) Any participant that is performing contracts and desires to substitute one veteran owner for another shall submit a proposed novation agreement and supporting documentation in accordance with FAR Subpart 42.12 to the contracting officer prior to the substitution or change of ownership for approval.

(3) Where the transfer results from the death or incapacity due to a serious, long-term illness or injury of an eligible principal, prior approval is not required, but the concern must file an updated VA Form 0877 with contracting officer and CVE within 60

days of the change. Existing contracts may be performed to the end of the instant term. However, no options may be exercised.

(4) Continued eligibility of the participant with new ownership requires that CVE verify that all eligibility requirements are met by the concern and the new owners. Therefore, submissions made in accordance with paragraph (f)(1) of this section shall be treated as a reapplication and will be processed by CVE pursuant to section 74.14 of this part.

5. Revise § 74.4 to read as follows:

§ 74.4 Who does CVE consider to control a veteran-owned small business?

(a) Control means the strategic policy, long-term decision-making authority, and the management of daily business operations for the VOSB. An applicant's or participant's management must be conducted by one or more veterans. Many persons share control of a concern, including each of those occupying the following positions: Officer, director, general partner, managing partner, managing member and manager. In addition, key employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. CVE will consider the control potential of such key employees on a case-by-case basis.

(b) Control is not the same as ownership, although both may reside in the same person. CVE regards control as including both the strategic policy setting exercised by boards of directors and the management of daily business operations. Individuals managing the concern must have managerial experience of the extent and complexity

needed to run the concern. A veteran need not have the technical expertise or possess a required license to be found to control an applicant or participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required license(s) or technical expertise. However, where a critical license(s) is held by a non-veteran having an equity interest in the applicant or participant firm, the non-veteran may be found to control the firm pursuant to paragraph (j)(2) of this section.

(c)(1) An applicant or participant must be controlled by one or more veterans who possess requisite management capabilities. Veteran owners need not work full-time but must show sustained and significant time invested in the business. A veteran owner engaged in employment or management outside the applicant concern must submit a written statement supplemental to the application which demonstrates that such activities will not have a significant impact on the owner's ability to manage and control the applicant concern. Applications from concerns seeking joint-venture status are exempt from the requirement to submit a supplemental written statement.

(2) One or more veterans who manage the applicant or participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the VOSB itself, and not to firms in which the veteran has a mere ownership interest.

(3) An eligible full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or participant.

(d) Except as provided in paragraph (h) of this section, a veteran owner's unexercised right to cause a change in the management of the applicant concern does not in itself constitute veteran control, regardless of how quickly or easily the right could be exercised.

(e) The veteran(s) upon whom eligibility is based must control the applicant or participant's governing body. Control may be established through actual numbers, voting based on ownership interest held by directors, members, managers or partners, bloc voting (e.g., where two or more directors vote as a single block pursuant to a written agreement), or weighted voting (e.g., in a concern having a two-person board of directors where one individual on the board is a veteran and one is not, the veteran vote must be weighted—worth more than one vote—in order for the concern to be eligible for VetBiz VIP Verification). Where a concern seeks to comply with this paragraph:

(1) The veteran(s) upon whom eligibility is based must have control over all decisions of the governing body, with the exception of extraordinary business decisions. Extraordinary business decisions include, but are not limited to, acceptance of new capital contributions, addition of members to an LLC or partnership, amendment of an operating or partnership agreement in a manner that materially alters members' rights, material amendments to bylaws, issuance of additional shares of capital stock, and the sale or lease of all or substantially all of a concern's assets.

(2) Provisions for the establishment of a quorum cannot permit non-veterans, such as directors, members, managers or partners to control the governing body, directly or indirectly;

(3) A veteran upon whom eligibility is based must be able to unilaterally amend the governing documents without requiring the consent of non-veterans, such as shareholders, directors, members, managers or partners, except amendments that are extraordinary business decisions;

(4) Any executive committee of the applicant's or participant's governing body must be controlled by veteran(s) acting as director(s) unless the executive committee can only make recommendations to and cannot independently exercise the authority of the board of directors;

(5) Non-voting, advisory, or honorary directors, members, managers or partners may be appointed without affecting veterans' control of the governing body.

(6) Arrangements regarding the structure and voting rights of the board of directors, or other governing bodies, must comply with applicable state law.

(f) In the case of a partnership, one or more veterans must serve as general partners, with control over all partnership decisions, except as provided in paragraph (e)(1). A partnership in which no veteran is a general partner will be ineligible for participation.

(g) In the case of a limited liability company, one or more veterans must serve as management members, with control over all decisions of the limited liability company, except as provided in paragraph (e)(1).

(h) In the case of a corporation, one or more veterans must control the board of directors of a corporate applicant or participant. CVE will deem veterans to control the board of directors when veterans owning at least 51% of voting stock have the power to

unilaterally, or through a block voting agreement, remove any director at any time for any reason.

(i) Non-veterans may be involved in the management of an applicant or participant, and may be stockholders, partners, limited liability members, officers, or directors of the applicant or participant. However, with the exception of a surviving spouse, or permanent caregiver who represents a severely disabled veteran owner, no non-veteran or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or participant;

(2) Be a former employer or a principal of a former employer of any affiliated business of the applicant or participant, unless it is determined by the CVE that the relationship between the former employer or principal and the eligible individual or applicant concern does not give the former employer actual control or the potential to control the applicant or participant and such relationship is in the best interests of the participant firm; or

(3) Receive compensation in any form, including distributions, from the applicant or participant as directors, officers or employees, which exceeds the compensation to be received by the highest officer (usually President or Chief Executive Officer). The highest ranking officer may elect to receive less compensation than a non-veteran only upon demonstrating that it helps the applicant or participant.

(j) Non-veterans or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) Non-veterans control the board of directors of the applicant or participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-veterans effectively to prevent a quorum or block actions proposed by the veterans.

(2) A non-veteran or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or participant. For the purposes of this part, financing, bonding or licensure will be deemed critical where the withholding or withdrawal of the support may cause a business to fail to meet its financial obligations, may allow a non-veteran or entity to significantly influence business decisions, or may result in a dependent relationship with a non-veteran or entity.

(3) A non-veteran or entity controls the applicant or participant or an individual veteran owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-veteran or entity the power to control a firm.

(4) Business relationships exist with non-veterans or entities which cause such dependence that the applicant or participant cannot exercise independent business judgment without great economic risk.

6. Revise § 74.5 to read as follows:

§ 74.5 How does CVE determine affiliation?

(a) CVE does not determine affiliation. Affiliation is determined by the SBA in accordance with 13 CFR Part 121.

(b) Joint ventures may apply for inclusion in the VetBiz VIP Verification Program. To be eligible for inclusion in the VetBiz VIP Verification Program a joint venture must demonstrate that:

(1) The underlying VOSB upon which eligibility is based is verified in accordance with this part;

(2) The underlying VOSB upon which eligibility is based is entitled to at least 51% of the net profits earned by the joint venture;

(3) The joint venture agreement complies with the requirements set forth in 13 CFR 125.15(b)(2).

7. Revise § 74.10 to read as follows:

§ 74.10 Where must an application be filed?

An application for VetBiz VIP Verification status must be electronically filed in the Vendor Information Pages database located on the CVE's Web portal, <http://www.VetBiz.gov>. Guidelines and forms are located on the Web portal. Upon receipt of the applicant's electronic submission, an acknowledgment message will be dispatched to the concern containing estimated processing time and other information. Address information for the CVE is also located on the Web portal.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0675.)

8. Revise § 74.11 to read as follows:

§ 74.11 How does CVE process applications for VetBiz VIP Verification Program?

(a) The Director, CVE, is authorized to approve or deny applications for VetBiz VIP Verification. CVE will receive, review and examine all VetBiz VIP Verification applications. CVE will advise each applicant within 30 days, when practicable, after the receipt of an application whether the application is complete and suitable for a verification examination and, if not, what additional information or clarification is required to complete the application. CVE will process an application for VetBiz VIP Verification status within 60 days, when practicable, of receipt of a complete application package. Incomplete application packages will not be processed.

(b) CVE, in its sole discretion, may request clarification of information relating to eligibility at any time in the eligibility determination process. CVE will take into account any clarifications made by an applicant in response to a request for such by CVE.

(c) CVE, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial.

(d) An applicant's eligibility will be based on the totality of circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section, additional documentation is submitted pursuant to paragraph (c) of this section, as provided in paragraph (e) of this section or in the case of amended

documentation submitted pursuant to section 74.13(a) of this part. The applicant bears the burden to establish its status as a VOSB.

(e)(1) Changed circumstances for an applicant occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for denial of the application. The applicant must inform CVE of any changed circumstances that could adversely affect its eligibility for the program (*i.e.*, ownership or control changes) during its application review.

(2) *Bankruptcy*. Bankruptcy is a change in circumstance requiring additional protection for the agency. Should a VOSB enter into bankruptcy the participant must:

- (i). Inform CVE of the filing event within 30 days;
- (ii). Specify to CVE whether the concern has filed Chapter 7, 11 or 13 under U.S. Bankruptcy code; and
- (iii) Any participant that is performing contracts must assure performance to the contracting officer(s) prior to any reorganization or change if necessary including such contract's in the debtor's estate and reorganization plan in the bankruptcy.

(f) The decision of the Director, CVE, to approve or deny an application will be in writing. A decision to deny verification status will state the specific reasons for denial, and will inform the applicant of any appeal rights.

(g) If the Director, CVE, approves the application, the date of the Notice of Verified Status Approval letter is the date of participant verification for purposes of determining the participant's verification eligibility term.

(h) The decision may be sent by mail, commercial carrier, facsimile transmission, or other electronic means. It is the responsibility of the applicant to ensure all contact information is current in the applicant's profile.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0675.)

9. Revise § 74.12 to read as follows:

§ 74.12 What must a concern submit to apply for VetBiz VIP Verification Program?

Each VetBiz VIP Verification applicant must submit the VA Form 0877 and supplemental documentation as CVE requires. All electronic forms are available on the VetBiz.gov VIP database Web pages. From the time the applicant dispatches the VA Form 0877, the applicant must also retain on file, at the principal place of business, a complete copy of all supplemental documentation required by, and provided to, CVE for use in verification examinations. The documentation to be submitted to CVE includes, but is not limited to: Articles of Incorporation/Organization; corporate by-laws or operating agreements; shareholder agreements; voting records and voting agreements; trust agreements; franchise agreements, organizational, annual and board/member meeting records; stock ledgers and certificates; State-issued Certificates of Good Standing; contract, lease and loan agreements; payroll records; bank account signature

cards; financial statements; Federal personal and business tax returns for up to 3 years; and licenses. These materials shall be filed together to maximize efficiency of verification examination visits, and will provide CVE with sufficient information to establish the management, control and operating status of the business on the date of submission.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0675.)

10. Revise § 74.13 to read as follows:

§ 74.13 Can an applicant ask CVE to reconsider its initial decision to deny an application?

(a) An applicant may request that the Director, CVE, reconsider his or her decision to deny an application by filing a request for reconsideration with CVE within 30 days of CVE sending the denial decision. "Filing" means a document is received by CVE by 11:59 p.m., Eastern Time, on that day. Requests for reconsideration must be submitted in accordance with the directions and to the address identified in the denial letter. The filing party bears the risk that the delivery method chosen will not result in timely receipt at CVE. An applicant may submit additional or amended documentation as directed by CVE.

(b) The Director, CVE, will issue a written decision within 60 days, when practicable, of receipt of the applicant's request. The Director, CVE, may either approve

the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the Director, CVE, will explain why the applicant is not eligible for the VetBiz VIP Verification and give specific reasons for the denial.

(c) If the Director, CVE, denies the application solely on issues not raised in the initial denial, the applicant may ask for reconsideration as if it were an initial denial.

(d) If CVE determines that a concern may not qualify as small, they may directly deny an application for VetBiz VIP Verification and may request a formal size determination from the SBA. A concern whose application is denied because it is other than a small business concern by CVE may request that CVE reconsider the decision pursuant to this section. A favorable determination by SBA will enable the firm to immediately submit a new VetBiz VIP Verification.

(e) A denial decision that is based on the failure to meet any veteran eligibility criteria is not subject to a request for reconsideration and is the final decision of CVE.

(f) Except as provided in paragraph (c) of this section, the decision on the request for reconsideration shall be final.

(g) The decision on the request for reconsideration may be sent by mail, commercial carrier, facsimile transmission, or other electronic means. It is the responsibility of the applicant to ensure all contact information is current in the applicant's profile.

11. Revise § 74.14 to read as follows:

§ 74.14 Can an applicant or participant reapply for admission to the VetBiz VIP Verification Program?

(a) Once an application, a request for reconsideration, or an appeal of a verified status cancellation has been denied, or a verified status cancellation has been issued, the applicant or participant shall be required to wait for a period of 12 months before a new application will be processed by CVE.

(b) Participants may reapply prior to the termination of their eligibility period. If a participant is found to be ineligible the participant will forfeit any time remaining on their eligibility period and will be immediately removed from the VetBiz VIP Verification database. An applicant removed pursuant to this section may ask CVE to reconsider its decision in accordance with section 74.13 of this Part. The date of a new determination letter verifying an applicant will be the beginning of the next two-year eligibility period.

12. Revise § 74.15 to read as follows:

§ 74.15 What length of time may a business participate in VetBiz VIP Verification Program?

(a) A participant receives an eligibility term of 2 years from the date of CVE's Notice of Verified Status Approval letter establishing verified status.

(b) The participant must maintain its eligibility during its tenure and must inform CVE of any changes that would adversely affect its eligibility within 30 days.

(c) The eligibility term may be shortened by removal pursuant to § 74.2 of this Part, application pursuant to § 74.14(b) of this Part, voluntary withdrawal by the participant pursuant to § 74.21 of this Part, or cancellation pursuant to § 74.22 of this Part.

(d) CVE may initiate a verification examination whenever it receives credible information concerning a participant's eligibility as a VOSB. Upon its completion of the examination, CVE will issue a written decision regarding the continued eligibility status of the questioned participant.

(e) If CVE finds that the participant does not qualify as a VOSB, the procedures at § 74.22 of this Part will apply, except as provided in § 74.2 of this Part.

(f) If CVE finds that the participant continues to qualify as a VOSB, the original eligibility period remains in effect.

13. Revise § 74.20 to read as follows:

§ 74.20 What is a verification examination and what will CVE examine?

(a) *General.* A verification examination is an investigation by CVE officials, which verifies the accuracy of any statement or information provided as part of the VetBiz VIP Verification application process. Thus, examiners may verify that the concern currently meets the eligibility requirements, and that it met such requirements at the time of its application or its most recent size recertification. An examination may be conducted on a random, unannounced basis, or upon receipt of specific and credible information alleging that a participant no longer meets eligibility requirements.

(b) *Scope of examination.* CVE may conduct the examination at one or all of the participant's offices or work sites. CVE will determine the location(s) of the examination. CVE may review any information related to the concern's eligibility requirements including, but not limited to, documentation related to the legal structure, ownership and control. As a minimum examiners shall review any or all of the organizing documents,

financial documents and publicly available information as well as any information identified in section 74.12 of this part.

14. Revise § 74.21 to read as follows:

§ 74.21 What are the ways a business may exit VetBiz VIP Verification Program status?

A participant may:

(a) Voluntarily cancel its status by submitting a written request to CVE requesting that the concern be removed from public listing in the VIP database; or

(b) Delete its record entirely from the VIP database; or

(c) CVE may remove a participant immediately pursuant to § 74.2; or

(d) CVE may remove a participant from public listing in the VIP database for good cause upon formal notice to the participant. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the participant's VetBiz VIP Verification application.

(2) Failure by the participant to maintain its eligibility for program participation.

(3) Failure by the participant for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, management, and control by veterans, service-disabled veterans or surviving spouses.

(4) Failure by the concern to disclose to CVE the extent to which non-veteran persons or firms participate in the management of the participant.

(5) A pattern of failure to make required submissions or responses to CVE or its agents, including a failure to make available financial statements, requested tax returns,

reports, information requested by CVE or VA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(6) Cessation of the participant's business operations.

(7) Failure by the concern to provide an updated VA Form 0877 within 30 days of any change in ownership, except as provided in paragraph 74.3(f)(3) of this part.

(d) The examples of good cause listed in paragraph (c) of this section are intended to be illustrative only. Other grounds for canceling a participant's verified status include any other cause of so serious or compelling a nature that it affects the present responsibility of the participant.

(e) Failure to inform CVE of any such changed circumstances, as outlined in paragraphs (c) and (d) of this section, within 30 days constitutes cause for which CVE may cancel verified status of the participant.

15. Amend § 74.22 by revising paragraphs (a) and (e) to read as follows:

§ 74.22 What are the procedures for cancellation?

(a) *General.* When CVE believes that a participant's verified status should be cancelled prior to the expiration of its eligibility term, CVE will notify the participant in writing. The Notice of Proposed Cancellation Letter will set forth the specific facts and reasons for CVE's findings, and will notify the participant that it has 30 days from the date CVE sent the notice to submit a written response to CVE explaining why the proposed ground(s) should not justify cancellation.

* * * * *

(e) *Appeals*. A participant may file an appeal with the Executive Director, OSDBU, concerning the Notice of Verified Status Cancellation within 30 days of receipt of CVE's cancellation decision. "Filing" means a document is received by CVE by 5:30 p.m., eastern time, on that day. Documents may be filed by hand delivery, mail, commercial carrier, or facsimile transmission. Hand delivery and other means of delivery may not be practicable during certain periods due, for example, to security concerns or equipment failures. The filing party bears the risk that the delivery method chosen will not result in timely receipt at CVE. Submit appeals to: Executive Director, Office of Small and Disadvantaged Business Utilization and Center for Veterans Enterprise (OOVE), U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. A formal decision will be issued within 60 days after receipt. The decision on the appeal shall be final.

16. Revise § 74.25 to read as follows:

§ 74.25 What types of personally identifiable information will VA collect?

In order to establish owner eligibility, VA will collect individual names and Social Security numbers of all owners who represent themselves as having ownership interests in a specific business seeking to obtain verified status.

17. Revise § 74.26 to read as follows:

§ 74.26 What types of business information will VA collect?

VA will examine a variety of business records. See section 74.12, “What must a concern submit to apply for VetBiz VIP Verification Program?”

18. Revise § 74.27 to read as follows:

§ 74.27 How will VA store information?

VA stores records provided to CVE fully electronically on the VA's secure servers. CVE personnel will compare information provided concerning owners against any available records. Any records collected in association with the VetBiz VIP verification program will be stored and fully secured in accordance with all VA records management procedures. Any data breaches will be addressed in accordance with the VA information security program.

19. Revise § 74.28 to read as follows:

§ 74.28 Who may examine records?

Personnel from VA, CVE and its agents, including personnel from the SBA, may examine records to ascertain the ownership and control of the applicant or participant.

20. Revise §74.29 to read as follows:

§ 74.29 When will VA dispose of records?

The records, including those pertaining to businesses not determined to be eligible for the program, will be kept intact and in good condition and retained in accordance with VA records management procedures following a program examination or the date of the last Notice of Verified Status Approval letter. Longer retention will not be required unless a written request is received from the Government Accountability Office not later than 30 days prior to the end of the retention period.

(Authority: 38 U.S.C. 8127(f))

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